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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 92

UNITED STATES OF AMERICA, PETITIONER

v.

CITY OF NEW BRITAIN, CONNECTICUT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the Superior Court of Connecticut for Hartford County (R. 8) is not reported. The opinion of the Supreme Court of Errors of Connecticut (R. 17-23) is reported at 139 Conn. 363.

JURISDICTION

The judgment of the Supreme Court of Errors of Connecticut was entered on December 30, 1952. (R. 23.) On March 11, 1953, Mr. Justice Jackson extended the time for filing a petition for a writ

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of certiorari to and including May 29, 1953. (R. 24.) The petition for a writ of certiorari was filed on May 26, 1953, and was granted on October 12, 1953. (R. 25.) The jurisdiction of this Court is conferred by 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether tax liens accorded the United States by the federal tax lien statute (Sections 3670-3672 of the Internal Revenue Code) are rendered subordinate to those accorded a municipality by a state statute, merely because the state statute places the municipal liens ahead of those which the federal statute excepts from the validity of the federal lien.

2. Whether those of the municipal liens which by state statute arose before the federal liens are, solely by reason of that fact, paramount to the federal liens.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 30-33.

STATEMENT

This case involves the relative superiority of tax liens of the United States and those of the City of New Britain, Connecticut, upon property of a delinquent taxpayer, General Laundry Service, Inc. The property was sold in connection with the foreclosure of two mortgages, and the proceeds of the sale after satisfaction of the mortgages and other prior claims were insufficient to satisfy both the municipal and the federal tax liens.

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The foreclosure action was instituted in the Superior Court for Hartford County, Connecticut, by Louis Brown, as mortgagee, against General Laundry Service, Inc., the taxpayer-mortgagor, and others, including the United States and the City of New Britain, Connecticut, who claimed an interest in the mortgaged property. (R. 1-4.) The action resulted in a judgment of foreclosure and sale of the property. (R. 5-6.) The proceeds of the sale plus rents collected by a receiver of rents amounted to $28,071.24, and the expenses of the sale amounted to $1,761.09. By supplemental judgment ratifying the sale, the Superior Court found that the property and the net proceeds of the sale were subject to tax liens of the City totaling $3,587.71; mortgage liens in the amount of $15,319.35; a judgment lien in the amount of $2,017.18; and tax liens of the United States totaling $8,475.13. (R. 9-11.)

The tax liens of the United States are for withholding taxes for periods from 1947 to 1950, the assessment lists of which had been received by the Collector on various dates between April 26, 1948, and September 21, 1950; federal insurance contributions for periods from 1949 to 1950, the assessment lists of which had been received by the Collector on various dates between June 20, 1949, and September 21, 1950; and federal unemployment tax for the year 1948, the assessment list of which had been received by the Collector on July 26, 1950. The United States demanded payment of these taxes, totaling $8,475.13, but payment was not made. Notice of federal tax liens in that amount

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was then filed in the office of the Town Clerk of New Britain and in the office of the Clerk of the United States District Court in New Haven, on March 19, 1951. (R. 15-16.)

The tax liens of the City are for real estate taxes for 1947 to 1951 which became due at various dates between October 1, 1947, and 1951; and for water rents which became due at various dates between December 1, 1947, and June 1, 1951. (R. 14-15.)

The United States conceded that its liens were subordinate to the mortgages and the claim of the judgment creditor,[1] but contended that they were paramount to the liens of the City. The Superior Court of Connecticut ruled that the net proceeds of the sale were distributable to the respective lienors in the following order: The City, the mortgagee, the judgment creditor, and the United States. This left a balance of only $5,385.91 available for payment to the United States on account of its tax liens totaling $8,475.13. (R. 10-11, 16.) The court held that the City's liens took precedence over the United States tax liens on the ground that they were "created by the State of Connecticut and represent an attribute of sovereignty," and that Congress had not provided for priority of federal tax liens. (R. 8.) On appeal by the United States,

[1] The mortgagee and judgment creditor fall within the provisions of Section 3672 of the Internal Revenue Code, which excepts from the validity of the federal tax lien a "mortgagee, pledgee, purchaser, or judgment creditor" whose interest is acquired before notice of the federal lien is filed. Thus, the controversy concerns solely the relative superiority of the federal and municipal tax liens in relation to the surplus proceeds of the foreclosure sale. (R. 14.)

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the Supreme Court of Errors affirmed, holding that the liens accorded the United States for its taxes by the federal lien statute (Sections 3670-3672 of the Internal Revenue Code) were inferior to those accorded the City for its taxes by the Connecticut statute. (R. 17-23.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the liens of the City, including those which arose after the federal tax liens had arisen, fell within the exception to the validity of the federal lien enacted by Congress in Section 3672 of the Internal Revenue Code in favor of mortgage and judgment liens, merely because the Connecticut statute grants the municipal liens superiority over mortgage and judgment liens.

2. In holding that each of the City's liens was paramount to each of the tax liens of the United States.

3. In holding that under Section 3670 of the Internal Revenue Code the relative superiority of tax liens of the United States and liens of the City depends upon the time when the respective liens arose.

4. In holding that those liens of the City which arose before the federal tax liens came into existence were sufficiently perfected to divest the taxpayer of property to which the federal liens, when they arose, would otherwise have attached.

5. In affirming the judgment of the Superior Court.

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SUMMARY OF ARGUMENT

Sections 3670 and 3671 of the Internal Revenue Code vest in the United States a lien for unpaid taxes upon "all property * * * belonging to" a delinquent taxpayer, arising when the assessment list is received by the Collector. Section 3672 provides that the lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed * * *." The court below held that, since the municipal liens involved here are made superior under Connecticut law to mortgages and judgment liens—which the federal statute excepts from the validity of an unrecorded federal tax lien—the municipal liens are paramount to the federal liens. Alternatively, it held, on the principle of "first in time, first in right," that the municipal liens which arose before the federal liens were, by virtue of that fact, entitled to priority of payment. Both holdings, we submit, are erroneous.

I

Both logic and authority are violated by the theory that the municipal liens, simply because they are superior under Connecticut law to mortgages and judgment liens, may displace federal liens, which, under federal law, are invalid before recordation as against mortgages and judgment liens. What is decisive here is that the controlling federal law accords no such precedence to the municipal liens over the federal liens.

The exceptions to the paramount validity of the federal lien are only those enumerated in Section

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3672 of the Internal Revenue Code, and the list may not be enlarged by state law. *United States* v. *Security Trust & Savings Bank,* 340 U.S. 47; *United States* v. *Gilbert Associates,* 345 U.S. 361. This conclusion is compelled, not only by the language of the federal lien provisions, but by their history. As first enacted in 1866, they admitted of no exceptions. *United States* v. *Snyder,* 149 U.S. 210. The exceptions since created have been specific and limited. Because the respondent City's liens are not among these exceptions, they may not be read in on the ground that they are superior, under state law, to others Congress included. Any other conclusion would leave the federal statute to be varied by each state, expanding the exceptions to include those declared by state law to take precedence over the interests Congress saw fit to protect in Section 3672. Settled principles, applied in squarely controlling decisions of this Court, preclude such a result. *United States* v. *Gilbert Associates, supra; Michigan* v. *United States,* 317 U.S. 338, 340.

The State's order of precedence may be accepted without improper subordination of the federal lien, by setting aside funds sufficient to pay the interests preferred by Section 3672 and allowing the City to satisfy its liens from that sum. See *Spokane County* v. *United States,* 279 U. S. 80, 91.

II

The holding below that the federal tax lien must take its place in line, like any ordinary private lien (and unlike the City liens involved here),

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under the "first in time, first in right" formula, is contrary to *United States* v. *Security Trust & Savings Bank,* 340 U.S. 47. There, an attachment lien arose prior to the federal lien and was later "merged" (in terms of the state law) in a judgment obtained after the federal lien was recorded. This Court held, first, that the judgment could not "relate back" to the attachment and thereby bring the latter within Section 3672, which covers judgment liens. Second, and directly applicable here, the Court held that, though first in time, the attachment lien was second in right to the federal tax lien. Assimilating the tax lien statute to the federal priority provision in R.S. 3466, the Court held that "a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it" (340 U.S. at 51) could not defeat the paramount federal lien.

There is nothing in the tax lien provisions to warrant a distinction between the attachment lien in *Security Trust* and the municipal liens involved here. *United States* v. *Gilbert Associates,* 345 U.S. 361, dealt with municipal liens like the ones here in every material respect. Although they were at least as "perfected" as the respondent's, those liens were held insufficiently perfected to defeat the federal priority under R.S. 3466. Since under the *Security Trust* decision, "a similar rule must prevail here" (340 U.S. at 51), the fact that the City's liens were declared by Connecticut law to "arise" first cannot justify their supersedure of the federal liens.

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ARGUMENT

Section 3670 of the Internal Revenue Code (Appendix, *infra,* p. 30) provides that unpaid federal taxes "shall be a lien in favor of the United States upon all property * * * belonging to" the delinquent taxpayer. Under Section 3671 (Appendix, *infra,* p. 30) the lien ordinarily arises when the assessment list is received by the Collector, and it continues until the tax liability is paid or becomes unenforceable by the lapse of time. Section 3672 (Appendix, *infra,* pp. 30-31) provides that the lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector" in a designated recording office.

The question in this case is whether liens for federal taxes arising under the above statutory provisions are paramount to those accorded the City of New Britain for its taxes and water rates by the laws of Connecticut.[2] The federal liens are fourteen in number and arose on various dates between 1948 and 1950, while the municipal liens are nineteen in number and arose on various dates between

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[2] The municipal liens are created by Sections 758 (water rates) and 1853 (taxes) of the General Statutes of Connecticut (1949 Rev.) (Appendix, *infra,* pp. 31-33). Section ~~1843~~ 1853 provides that the tax liens "shall take precedence of all transfers and incumbrances." Section 758 provides that the water liens "shall take precedence over all other liens or incumbrances except taxes"—the word "taxes" referring, under the authoritative construction of the court below, only to "those taxes which may be assessed in favor of the state or some subdivision thereof and which, under the law, are secured by specific liens upon real property" (R. 18). Accordingly, both types of liens are on an equal footing for purposes of the present controversy, and there is no need to consider them separately.

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1947 and 1951 (R. 15-16). Thus, some of the federal liens antedated some of the municipal liens, and *vice versa*. The property subject to the liens was sold in connection with the foreclosure of two mortgages, and the net proceeds of the foreclosure sale, after satisfaction of the mortgages and a judgment claim,[3] were insufficient to satisfy both the federal and the municipal liens. The United States and the City each contends that its tax liens are superior to those of the other.

The court below, affirming the Connecticut Superior Court (R. 10-11), has held that all of the City's liens must be paid before any of the federal liens, including the City liens arising after, as well as the ones arising before, those of the United States. This result followed, the court reasoned, because (1) the federal liens, under Section 3672 of the Internal Revenue Code, are subordinate to mortgages and judgment liens arising before notice of the federal liens is filed; (2) the City's liens are, under the Connecticut law, superior to mortgages, judgments, and other incumbrances, regardless of when they arise; so that (3) the City's liens, though not covered by any exception in the federal statutes, must be superior to the federal liens which Congress has subordinated to mortgages and judgments. (R. 22.) If correct, this holding, which is the only one discussed in the brief opposing certi-

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[3] Notice of the federal tax liens was recorded on March 19, 1951 (R. 15), subsequent to the time the mortgage and judgment claims arose (R. 17), and the United States accordingly conceded below that those claims fall within the exceptions contained in Code Section 3672 (R. 14, 18).

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orari, would dispose of the entire case. In the first point of our argument, we propose to show that this holding is erroneous.

As to those of the City's liens which antedate the federal liens, the court below also held that these were entitled to priority on "[t]he principle ordinarily applicable to the determination of priority of incumbrances, namely, first in order of time, first in right" (R. 21). Our second point demonstrates that this ruling, opposed to controlling decisions of this Court, is also incorrect.

I

The Municipal Liens Are Not Rendered Superior to the Federal Liens Merely Because the State Law Places Them Ahead of Liens to Which the Federal Law Grants Superiority

The very statement of the holding below on this issue (*supra,* p. 10) goes far, in our view, to refute it. It is true, of course, that the federal tax lien, before recordation, is invalid *under federal law* against mortgages and judgment liens. It is equally undisputed that the City's liens are superior to the same mortgages and judgment liens *under Connecticut law.* But cf. footnote 12, *infra,* pp. 26-27. But it does not follow at all that the City's liens, whether arising earlier or later than the federal liens, must be paramount to the latter. On the contrary, the decisive point is that the federal law, admittedly controlling, accords no such paramountcy to the City's liens. There is nothing in the federal law to permit these municipal liens to ride the shoulders of private liens which Congress

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has chosen to protect—and which the State, for its own purposes, may of course subordinate—and thereby achieve a superiority which Congress has not chosen to grant. Settled principles defining the scope and effect of the federal tax lien preclude the result reached below.[4]

The establishment by Congress of a lien for federal taxes is an exercise of its constitutional authority to lay and collect taxes, and the laws of Congress enacted pursuant to that authority are by the Constitution declared to be the supreme law of the land. Constitution of the United States, Art. I, Sec. 8; Art. VI; *United States* v. *Snyder*, 149 U.S. 210; *Michigan* v. *United States*, 317 U.S. 338; cf. *Spokane County* v. *United States*, 279 U.S. 80. In Section 3670 of the Internal Revenue Code, Congress has vested in the United States a lien for unpaid taxes "upon all property and rights to property, whether real or personal, belonging to" the tax debtor. The purpose of this provision is "to insure prompt and certain collection of taxes due the United States from tax delinquents * * *."

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[4] Directly contrary to the decision below are *Samms* v. *Chicago Title & Trust Co.*, 111 N.E. 2d 172 (Ill. App.); *Hopkins* v. *Eureka Coal Co.* (1944 C.C.H. Fed. Tax Reporter, Par. 9320, Circ. Ct. W. Va., Feb. 25, 1944); *Sunlight Metal Products* v. *McClure, et al.*, C.A. No. 3497, D. Colo., March 24, 1952 (unreported). On the other hand, *Ferris* v. *Chic-Mint Gum Co.*, 14 Del. Ch. 232, upon which the court below relied (R. 22), was said at the time to be limited to its peculiar facts (14 Del. Ch. at 240) and has been so limited and in effect discarded by the court which rendered it. *In re Mitchell's Restaurant, Inc.*, 31 Del. Ch. 121. *Board of Supervisors* v. *Hart*, 210 La. 78, also cited below (R. 22), was relied upon by the California court which was reversed in *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, and is contrary to the latter decision.

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United States v. *Security Trust & Savings Bank*, 340 U.S. 47, 51. "Stronger language could hardly have been selected to reveal" that purpose. *Glass City Bank* v. *United States*, 326 U.S. 265, 267.

Except as Congress has provided otherwise, the tax lien accorded the United States by Section 3670 is paramount to state-created liens. And the only exceptions Congress has seen fit to allow are those explicitly set forth in Section 3672, which provides that the federal lien is invalid "as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed" in an appropriate office. The exceptions are confined to those enumerated in Section 3672, "and no others." *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47, 53 (concurring opinion of Mr. Justice Jackson). They may not be expanded by the states. *United States* v. *Gilbert Associates*, 345 U.S. 361.

This conclusion, clear enough from recent decisions of this Court, is settled beyond doubt by the history of the exceptions in Section 3672. Present Sections 3670-3672 of the Internal Revenue Code were derived from Section 3186 of the Revised Statutes, as amended by the Act of March 4, 1913, c. 166, 37 Stat. 1016; Section 3186 in turn was derived from the Act of July 13, 1866, c. 184, 14 Stat. 98, 107, Sec. 9. As originally enacted in 1866, it contained no provision for priority of any interest over the federal tax lien. Accordingly, in *United States* v. *Snyder*, 149 U.S. 210, it was held that the lien prevailed even as against a bona fide

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purchaser for value without notice or knowledge of the existence of the lien, despite state rules protecting purchasers from such secret, unrecorded interests. Thereafter, the amendment of March 4, 1913, *supra*, provided that the federal lien should "not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector".[5] Again, after a decision in 1938, *United States* v. *Rosenfield*, 26 F. Supp. 433 (E. D. Mich.), held the federal lien effective after filing against a bona fide purchaser of securities who had no notice or knowledge of the lien, the statute was amended to protect pledgees generally against unrecorded liens and to protect against even a recorded lien "any mortgagee, pledgee, or purchaser, [of securities], for an adequate and full consideration in money or money's worth, * * * without notice or knowledge of the existence of such lien." Section 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862.

It was this history of specific, sparing, *ad hoc* exceptions which led Mr. Justice Jackson to point

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[5] See H. Rep. No. 1018, 62d Cong., 2d Sess., p. 1; S. Rep. No. 1315, 62d Cong., 3d Sess., p. 1. The House report, citing the *Snyder* case, stated (p. 2) that

> the lien is so comprehensive that it covers all the property and rights to property of the delinquent situated anywhere in the United States, and any person taking title to real estate is subjected to the impossible task of ascertaining whether any person, who has at any time owned the real estate in question, has been delinquent in the payment of the taxes referred to while the owner of the real estate in question. The business carried on under the internal-revenue law may be at a great distance from the property affected by this secret lien, but this will not relieve the property from the lien.

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out that Section 3672 excludes from the paramount coverage of the federal lien "those types of interests which it specifically included in the statute and no others." *Security Trust, supra,* at 53 (concurring opinion). See, also, *United States* v. *Gilbert Associates, supra; MacKenzie* v. *United States,* 109 F. 2d 540 (C.A. 9); *Samms* v. *Chicago Title & Trust Co.,* 111 N. E. 2d 172 (Ill. App.). Against this background, the error of the court below becomes clear.

As the parties stipulated (R. 12), the controversy here "is between the city of New Britain and the United States of America as to which is entitled to priority in the distribution of the proceeds." Looking at these disputants alone, it is plain that the State, whether by statute or judicial decision, lacks power to grant to the City's liens a priority Congress has withheld. *Michigan* v. *United States,* 317 U.S. 338, 340. But this, in a word, is precisely what the decision below accomplishes by indirection. If such a result were permitted, then any interest a state declares superior to any of those Congress has protected would be added by state law to the exceptions specified in Section 3672. The result would, of course, destroy the uniformity sought in the federal tax scheme, leaving the scope of the federal statute to vary with state law.[6] But the more direct answer to the de-

[6] "A cardinal principle of Congress in its tax scheme is uniformity, as far as may be." *United States* v. *Gilbert Associates, supra,* at 364. See, also, *Burnet* v. *Harmel,* 287 U.S. 103, 110; *Lyeth* v. *Hoey,* 305 U.S. 188, 194; *United States* v. *Pelzer,* 312 U.S. 399, 402-403; *Helvering* v. *Stuart,* 317 U.S. 154, 161.

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cision below is simply that the municipal liens involved here are nowhere included in Section 3672, and neither the language nor the history of that Section supplies the remotest justification for reading them in.

Nor is there justification in the court's reasoning (R. 22) that "if priority were accorded to the Federal liens over those of the municipality, the result would have to be that either the rank of the municipal liens would be reduced below that of the mortgages and judgment lien, which would be in violation of the State law, or the position of the Federal liens would be moved up to a place ahead of the mortgages and judgment lien, in violation of § 3672." The kind of logically insoluble circularity the court sought to avoid may arise, of course, even where various liens governed by the law of a single jurisdiction compete with each other. See, *e.g.*, *Hoag* v. *Sayre*, 33 N. J. Eq. 552; 3 Glenn, *Mortgages*, §375.[7] The controlling point remains that the problem may not be avoided by misreading the federal statute to subordinate the federal lien. Congress has given no indication that in such circumstances it is the federal lien which is to fall behind; on the contrary, the breadth and reach of the federal lien (*supra*, pp. 12-15) make it the dominant interest.

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[7] The example considered in the cited sources involves an unrecorded mortgage which is superior to a later mortgage where the later mortgagee has actual notice, but inferior to an intervening judgment which is in turn superior to the second mortgage.

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But we note that the simple alternatives posed by the court below are not in fact exclusive. Full effect would be given to the federal statute by setting aside funds sufficient to pay the mortgages and judgment (covered by Section 3672) before satisfying the federal liens. Connecticut could then satisfy the municipal liens (excluded from Section 3672) from the sum so set apart. This procedure, suggested by the Government and referred to by this Court in *Spokane County* v. *United States*, 279 U.S. 80, 91—and adopted in *Samms* v. *Chicago Title & Trust Co.*, 111 N. E. 2d 172 (Ill. App.)—is the only one by which both the federal and the state law are given effect to the fullest permissible extent. If the end result be deemed incongruous in that the State takes from mortgagee and judgment creditor part or all of what the Federal Government leaves with them, the "incongruity arises by virtue of [the] state law and not by virtue of the federal enactment." *Samms* v. *Chicago Title & Trust Co., supra,* at 176. The State is free, of course, to subordinate the liens of its municipality in situations of this kind and rank them last on the ground that they fall behind the federal liens which yield in turn to the mortgages and judgment. The State is not free, however, unless Congress grants a further exception thus far withheld, to protect its City's liens at the expense of the paramount federal liens.

We turn, finally, to the suggestion in the opinion below (R. 22) that, since a mortgagee *could have* paid the City's tax charges and added their amount

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to his claims, the superiority accorded a mortgage should be extended to the City's liens. There is no ground for the assumption that a municipal tax lien, because it would have been assignable to a mortgagee who satisfied it, is therefore transformed into a mortgage lien within Section 3672. But even assuming the possibility of such a transformation in some circumstances, it could only occur if and when the tax was paid by the mortgagee; and since even a mortgage lien is not protected against the federal lien under Section 3672 unless it was acquired before the federal lien was recorded, the mortgagee's payment of the tax after the recording of the federal lien could not by "relation back" (*United States* v. *Security Trust & Savings Bank, supra,* at 50) be treated as having retroactively created an additional mortgage lien as of a prior date. Cf. 3 Glenn, *Mortgages,* pp. 1553-54.

It will be time enough to consider the position of a mortgagee subrogated to a lien prior to his, under state law, when the facts of a particular case present the problem. The undisputed fact here is that neither mortgagee ever paid off any of the City's liens. See *Samms* v. *Chicago Title & Trust Co., supra,* at 176. In the hands of the City, at least, they remain what they are—City liens for taxes and water charges, nowhere excepted by Section 3672 and accordingly subordinate to the federal liens.

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II

Those of the Municipal Liens Which Arose Before the Federal Liens Are Not for That Reason Superior

A. *The relative superiority of the federal tax lien and an adverse lien does not depend on when they respectively arose*

The court below held alternatively (R. 21-22) that those of the respondent City's liens which arose before the federal liens are entitled, because they were earlier in time, to be paid first. The court pointed out (R. 18-19) that the City's liens "would take precedence over any other incumbrance on the property, irrespective of the time at which that incumbrance might have attached." It concluded, however, that the federal lien, far from enjoying any comparable precedence, is subject to "[t]he principle ordinarily applicable to the determination of priority of incumbrances, namely, first in order of time, first in right" (R. 21). We think this conclusion is refuted by the recent decision of this Court in *United States* v. *Security Trust & Savings Bank,* 340 U.S. 47, as well as by the nature and incidence of the federal lien.

In the *Security Trust* case, the contest was between the United States asserting the type of tax lien involved here, and a party who had procured an attachment lien, subsequently merged in a judgment, against the property in controversy. The attachment lien had arisen before receipt of the pertinent assessment lists gave rise to the federal lien, and, of course, before recordation of the latter.

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The attaching creditor did not obtain judgment, however, until after the federal lien notices had been filed.[8]

In its decision which was subsequently reversed by this Court, the California District Court of Appeal held the federal tax lien subordinate to the attachment lien. *Winther* v. *Morrison,* 93 Cal. App. 2d 608. The court said, summarizing the effects of the pertinent California law (p. 611):

> * * * Since it is conceded that the attachment herein was properly issued and properly levied upon the property, it is evident that Morrison perfected a lien thereon which secured and insured the payment to him of any judgment that was recovered by him in the action, insofar as the property attached could be applied to the judgment. * * * The lien attached immediately upon the levy of the attachment.

Rejecting the Government's contention (p. 612) that the attachment lien was "not sufficiently specific or perfected to prevent a subsequent federal tax lien from attaching to the property with priority," the court declared (p. 613):

> The liens created by sections 3670 and 3671 of the Internal Revenue Code are general and

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[8] The attachment in question was levied on October 17, 1946. The federal assessment lists were received in November and December, 1946, and notices of federal liens were recorded in December, 1946. The judgment of the attaching creditor was rendered on April 24, 1947. Transcript of Record, Nos. 10-13, October Term, 1950, p. 20; and see *Winther* v. *Morrison*, 93 Cal. App. 2d 608, 610.

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> not priority liens. * * * There is no provision in either section indicating that the liens for taxes have a priority over attachment liens placed on the property prior to the time when the tax liens arise.

Building upon this premise, the court concluded, finally, that (p. 615):

> Whatever rights the [taxpayer] had in the real property involved were subject to the valid subsisting attachment lien of Morrison and the tax lien of the United States was not entitled to priority over it.[9]

The reasoning and decision of the California court, precisely duplicated in the holding of the court below that the principle of "first in order of time, first in right" applies to the federal tax lien, were rejected by this Court. Holding that the attachment lien was not specific and perfected, and that it could not become so from its inception by relation back of the judgment obtained after the federal lien was recorded, this Court concluded (340 U. S. at 51):

> In cases involving a kindred matter, *i.e.*, the federal priority under R. S. § 3466, it

[9] In the course of its decision, the California court distinguished *MacKenzie* v. *United States*, 109 F. 2d 540 (C.A. 9), where the federal tax lien was held superior to an attachment lien which arose later, but before notice of the federal lien had been filed. The court said (93 Cal. App. 2d at 613):

> Since the tax lien [in *MacKenzie*] arose prior to the issuance of the attachment it was not necessary to the decision to pass upon the priorities of tax and attachment liens where the tax lien, as here, arose after the levy of the attachment.

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> has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. *Illinois* v. *Campbell,* [329 U. S. 362,] 374. If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here. Accordingly, we hold that the tax liens of the United States are superior to the inchoate attachment of Morrison * * *.

That holding is squarely applicable here. Like the California attachment lien, the City liens involved here, lacking the perfection which alone might make a difference (see *infra,* pp. 25-28), are subordinate to the federal tax lien. For the *Security Trust* case leaves no doubt that Section 3670, when it extends the federal lien to all property and rights to property "belonging to" the taxpayer, means what it says. It makes clear that, since the mere existence of an earlier lien in no way divests the taxpayer of his property (*Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386, 444), such a lien cannot prevent the effective attachment of the federal lien to property which "belongs" to the taxpayer.

There is, in short, nothing in the federal statute to warrant subjection of the federal lien to the "first in time, first in right" doctrine. Before Congress wrote an express exception to cover them, even innocent purchasers for value, universally

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protected by the states against secret liens on real property, could claim no superiority over an unrecorded federal lien. *United States* v. *Snyder,* 149 U. S. 210. The general doctrine applied by the states against private lienors, conferring priority on a lien according to when it arises, is no more effective against the federal lien, unless Congress says so, than are the states' rules regarding notice. Nor do the exceptions Congress has allowed, conceding superiority to specified interests without regard to when they arise, provide any basis for application of state law priorities based on time. The City liens involved here are no different in this respect from the attachment lien in *Security Trust.* Insofar as their claimed superiority rests upon the bare fact that state law created them before the federal liens, the claim is identical with that in *Security Trust*—and equally groundless under the controlling federal law.

Indeed, this conclusion applies with special propriety to the kind of tax lien the respondent City asserts. Unlike the attachment lien in *Security Trust,* which presumably competed on an equal "first in time" basis with other private liens, the City's liens are placed ahead of all other liens regardless of when they arise. Section 1853, General Statutes of Connecticut (1949 Rev.), Appendix, *infra,* pp. 32-33. This rule of superiority for state tax liens is commonly found in state statutes.[10]

[10] See *Osterberg* v. *Union Trust Co.,* 93 U. S. 424; *Hefner* v. *Northwestern Life Ins. Co.,* 123 U. S. 747, 751; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375, 381; *Burfiend* v. *Hamilton,* 20 Mont. 343; *California Loan Etc. Co.* v. *Weis,* 118 Cal.

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Moreover, a similar precedence has been accorded state tax liens even where the state statute contains no explicit command to this effect. Thus, in *N. Y. Terminal Co.* v. *Gaus,* 204 N. Y. 512, the state statute, similar to Section 3670, provided merely that the state franchise tax should be a lien on all real and personal property until paid in full. Yet the lien was held paramount to that of a prior mortgage. See, also, *State of Minnesota* v. *Central Trust Co.,* 94 Fed. 244 (C.A. 8), certiorari denied, 174 U. S. 803; *Eaton's Appeal,* 83 Pa. St. 152, 154.

The lien Congress fashioned, apart from the express exceptions which are inapplicable here, is no less effective. The states may, as Connecticut has, impose liens on their taxpayers, superior to earlier private liens, even before any taxes are owing. They may not, however, as the *Security Trust* decision establishes, subordinate the federal lien to their own by a mere showing that theirs is prior in time. Congress wrote no such rule. It is as relevant here as in our earlier argument (see pp. 13-15, *supra*) that the exceptions to the paramountcy of the federal lien are those Congress allowed "and no others," and that, these exceptions aside, the federal lien covers "all property * * * belonging to" the taxpayer.

489; *Minneapolis Thresh. Mach. Co.* v. *Roberts County,* 34 S. D. 498; *Union Cent. Life Ins. Co.* v. *Black,* 67 Utah 268; *Hibernia Mortgage Co.* v. *Greco,* 191 La. 658; *Licking* v. *Hays Lumber Co.,* 146 Neb. 240.

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B. *None of the City's liens was perfected before the federal liens arose*

Definitively assimilating the federal tax lien statute to the federal priority statute (R. S. 3466) in determining the effect of an adverse lien (*cf. Michigan* v. *United States,* 317 U. S. 338, 340-341), the *Security Trust* decision leaves open only the possibility that a specific and perfected state-created lien which is prior in time might take precedence over the federal lien.[11] But this possibility is of no help to the respondent because, as we shall show, its liens are not "specific and perfected." It bears mention in this connection that the court below, in applying to the federal lien the "first in time, first in right" formula, proceeded on the erroneous assumption that "§ 3466 is fundamentally different from §§ 3670-3672" in this respect (R. 21). It found in Sections 3670-3672 "no provision for the priority of Federal liens over antedating liens in favor of others even though the latter may be inchoate and general." *Ibid.* So reasoning, the court had no need to determine

[11] The Court has repeatedly posed, but found it unnecessary to decide, the question whether a specific and fully perfected adverse lien can defeat the Government's priority under R. S. 3466. *United States* v. *Gilbert Associates,* 345 U. S. 361, 365; *Illinois* v. *Campbell,* 329 U. S. 362, 370; *United States* v. *Waddill Co.,* 323 U. S. 353, 355-356; *New York* v. *Maclay,* 288 U. S. 290, 294; *United States* v. *Texas,* 314 U. S. 480, 485-486; *Spokane County* v. *United States,* 279 U. S. 80, 95. Since, as we show below, the City's liens in this case were plainly not "perfected" within the meaning that term acquires from the foregoing decisions, there is no occasion to reach in the present context the still open question. Compare the Brief for the United States in *Gilbert Associates,* pp. 45-47.

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whether the City had the kind of perfected liens which alone might take precedence over the federal claim.

The court did, however, characterize the City's liens as "both perfected and specific" (R. 20).[12]

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[12] Section 1853 of the Connecticut Statutes provides that the municipal lien "shall exist from the first day of October or other assessment date of the municipality in the year previous to that in which such tax, or the first installment thereof, shall have become due * * *." Considering the impact in another context of this lien which antedates any obligation of the taxpayer-licnee, the court below has said (*Merchants Bank & Trust Co.* v. *Pettison*, 112 Conn. 652, 656-657):

> * * * By our present law a tax becomes a lien upon the real estate from the date of its assessment "in the year previous to that in which said taxes become due and until one year after such taxes become due." * * * Where, as in the city of Hartford, if property was assessed July 1st, 1929, the tax became due July 1st, 1930, and the lien would begin on the first-mentioned date, and continue to July 1st, 1931. Even if taxes were paid the very day they became due, there would still be the tax assessed that same day for the ensuing year, and that also would be a first charge upon the property. * * * Since the due date of taxes in Hartford is the date of assessment of taxes for the ensuing year, all Hartford real estate is constantly subject to a "first charge" for taxes. Not only would it now be impossible to make first mortgage loans on real estate, in the sense of a "first charge" upon the property, but if there were in fact such a first mortgage, outstanding when a tax was laid, it would at once become a second and not a first charge and its character as a first mortgage in that sense, destroyed.

Accordingly, the court held that the existence of the municipal liens would not prevent application of a statute providing that where a judgment creditor foreclosing a judgment lien "holds a mortgage upon real estate in this State as security for the debt * * * that has gone into the judgment, which mortgage is a first charge upon the property mortgaged, the court shall, upon the motion of the judgment debtor or any later incumbrancer on the property covered by the judgment lien, order such mortgaged property to be first applied to the debt secured by it * * *." The decision makes clear, not only how far from "perfected" the City's liens are, but that even the "procedure"

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And, to meet that characterization squarely, we think it readily demonstrable that it cannot be accepted in order to subordinate the federal tax lien.

To be fully "perfected" in the sense which is relevant here, a lien must effect a "transfer of title or possession" (*United States* v. *Waddill Co.*, 323 U. S. 353, 360), and a lienor who "has acquired neither title nor possession" does not possess a sufficiently perfected lien to defeat the federal priority under R. S. 3466. *Illinois* v. *Campbell*, 329 U. S. 362, 376. The *Security Trust* case holds that "a similar rule must prevail here." 340 U. S. at 51.

Applying this "similar rule," it is plain that the City's lien fail to meet the test. No claim is or can be made that the City had divested the taxpayer of the property "by reducing it to possession" (*United States* v. *Gilbert Associates*, 345 U. S. 361, 366) before the federal liens arose.[*] In

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with which the state statute endows them must yield to the specific policy of another state statute. Compare Point I of this brief, *supra*, pp. 13-19. It yields a *fortiori* to the federal law.

[*] Section 1655 of the Connecticut General Statutes (Appendix, *infra*, p. 32) provides that during its existence the municipal tax lien "may be enforced by levy and sale" of the taxpayer's interest in the property. The same action is authorized under Section 798 of the Connecticut Statutes (Appendix, *infra*, p. 32) on liens for water charges. Similar provisions appeared in the New Hampshire statutes involved in *Gilbert Associates* (Revised Laws of New Hampshire (1942), c. 80, §§ 17, 18, 22, 23), and were not effective to endow the Town lien in that case specific and perfected. The decisive point there, as here, was that the Town never took possession of the property. See 345 U. S. at 366. And see p. 28, *infra*.

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every material respect, then, the City liens here are the same as the Town lien which was held insufficient in the *Gilbert Associates* case. The statement of this Court's holding there, substituting the word "City" for "Town," is precisely applicable here (345 U. S. at 366):

> * * * There is no ground for the contention here that the [City] had perfected its lien by reducing the property to possession. The record reveals no such action. The mere attachment of the [City's] lien before the recording of the federal lien does not * * * give the [City] priority over the United States. The taxpayer had not been divested by the [City] of either title or possession. The [City], therefore, had only a general, unperfected lien.

It may be noted, in fact, that the Town in the *Gilbert Associates* case had, at least superficially, a stronger claim that its lien was perfected than that of the City here. For there, the Town had twice exercised its power to sell the property in question at a tax sale whereas the City in this case has taken no comparable action. What is decisive, however, in both cases is that the property remained "property * * * belonging to" the taxpayer to which the federal liens attached when they arose. Because this is so, the municipal liens in both cases are insufficient to supersede the paramount claims of the United States.

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CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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NOVEMBER, 1953.

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APPENDIX

Internal Revenue Code:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1946 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1946 ed., Sec. 3671.)

SEC. 3672 [As amended by Section 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS

(a) *Invalidity of Lien Without Notice.*— Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment

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creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3672.)

General Statutes of Connecticut (1949 Rev.):

SEC. 758. *Rates for use.*—The legislative body shall establish just and equitable rates or charges for the use of the waterworks system authorized herein, to be paid by the owner of each lot or building which is connected with and uses such system and may change such rates or charges from time to time. * * *

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Such rates or charges, if not paid when due, shall constitute a lien upon the premises served and a charge against the owners thereof, which lien and charge shall bear interest at the same rate as would unpaid taxes. Such lien shall take precedence over all other liens or incumbrances except taxes and may be foreclosed against the lot or building served in the same manner as a lien for taxes. The amount of any such rate or charge which remains due and unpaid for thirty days may, with reasonable attorneys' fees, be recovered by the legislative body in a civil action in the name of the municipality against such owners. * * *

SEC. 1853. *Tax liens; precedence; enforcement.*—The interest of each person in each item of real estate, which shall have been legally set in his assessment list, shall be subject to a lien for that part of his taxes laid upon the valuation of such interest, as found in such list when finally completed, as such part may be increased by interest, fees and charges. Such lien, unless otherwise specially provided by law, shall exist from the first day of October or other assessment date of the municipality in the year previous to that in which such tax, or the first installment thereof, shall have become due until one year after such tax or first installment thereof shall have become due, and, during its existence, shall take precedence of all transfers and incumbrances, in any manner affecting such interest in such item, or any part of it. Such lien, during its existence, may be enforced by levy and sale of such real estate in the event that such person shall have com-

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plete title thereto or of his interest in such real estate in the event that he shall not have complete title thereto. No sale of real estate for taxes or foreclosure of any tax lien shall divest the estate sold of any existing lien for other taxes.

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